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August 20, 1997

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Reply Comments of Ameritech New Media, Inc. in CS Docket No. 97-141.

Dear Mr. Caton:

Enclosed for filing please find the original and four (4) copies of the Reply Comments of Ameritech New Media, Inc. In the Matter of Notice of Inquiry Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Notice of Inquiry Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 97-141

REPLY COMMENTS OF
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August 20, 1997

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FEDERAL COMMUNICATIONS COMMISSION
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REPLY COMMENTS OF
AMERITECH NEW MEDIA, INC.

Ameritech New Media, Inc. ("Ameritech") submits these brief Reply Comments solely to rebut inaccurate assertions and a severe distortion of the multichannel video programming distribution ("MVPD") market contained in the Comments of Home Box Office ("HBO") filed in this proceeding.[1/]

I. AN ANALYSIS OF THE TRENDS IN TODAY'S MARKETPLACE WARRANTS THE CONTINUATION AND, INDEED, STRENGTHENING OF THE PROGRAM ACCESS RULES.

There is a clear consensus outside the incumbent cable industry that the MVPD market can be accurately characterized as essentially noncompetitive.[2/] Indeed, earlier this year, the

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1/ In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141 (Notice of Inquiry) (rel. June 6, 1997).

2/ Comments of Ameritech New Media in the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, in CS Docket No. 97-141 (filed
(continued...)

Commission recognized the reality that competition to cable remains in its infancy when it found "very limited number of instances where incumbent cable system operators face competition from MVPDs offering services with very similar attributes (i.e. overbuild/ wired delivery)."[3/] Members of Congress also are increasingly vocal in their profound disappointment with the lack of meaningful competition to incumbent cable operators and are examining the possibility of strengthening the programming access rules.[4/]

2/(...continued)
July 23, 1997) ("Fourth Annual Assessment"); Comments of the Wireless Cable Association International, Inc., Fourth Annual Assessment at 3; Comments of BellSouth Corporation, Fourth Annual Assessment at 3; Comments of DIRECTV, Fourth Annual Assessment at 2. Media Access Project on behalf of Consumer Federation of America, Comments on Ameritech New Media Inc.'s Petition for Rulemaking to Amend 47 C.F.R. § 76.1003 -- Procedures for Adjudicating Program Access Complaints, filed May 16, 1997, RM No. 9097. (All recognized lack of competition and/or inability of consumers to enjoy diversity in MVPD market).

3/ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report in CS Docket No. 96-133, FCC 96-496, at ¶ 4 (rel. Jan. 2, 1997) ("Third Annual Report").

4/ Hearing on Multichannel Video Competition Before the Senate Committee on Commerce, Science, and Transportation, 105th Cong., 1st Sess. (April 10, 1997) ("Senate Video Competition Hearing") (statement of Senator John McCain, Chairman (R-AZ)): "In sum, I remain concerned that competition in the multichannel video market today is not as vigorous as it will have to be to effectively constrain cable rates. Today, I hope to gain an insight on what must be done to assure that competition will measure up to the task by 1999."; Hearing on Video Competition: The Status of Competition Among Video Delivery Systems, 105th Cong., 1st Sess. (July 29, 1997) ("House Video Competition Hearing") (statement of Representative Billy Tauzin, Chairman (R-LA)): "I want to call your attention to the fact that the subsequent hearing we plan will focus on what perhaps will be the most important part of this inquiry, and that will be the
(continued...)

It is against this backdrop that HBO boldly observes that the MVPD marketplace is fully competitive, program access problems have been cured, there is no evidence of price discrimination against alternative MVPDs attempting to compete with cable operators, and, therefore, the program access rules are no longer necessary and justified.[5/]

While HBO cites increases in subscriber penetration by DTH providers, MMDS, SMATV, and telco overbuilders as illustrative of the presence of competition,[6/] the fact remains that incumbent cable system operators' market share continues to reflect market dominance.[7/] If HBO's depiction of a robustly competitive MVPD market were accurate, cable prices would not be continuing to skyrocket, outstripping the rate of inflation by more than 3 to 1.[8/] Statistical data, however, only tell part of the story.

4/(...continued)
availability of programming to these various systems. Who owns it? Who controls it? Who distributes it? Whether or not in fact the ownership and control of programming and the lack of its availability or access by alternative providers may continue to be a problem for a competitive marketplace."; House Video Competition Hearing (statement of Representative Largent (R-OK)): "Why in the age of competition that access to programming among all cable providers, multi-channel video providers, is decreasing -- the access is decreasing,..."

5/ Home Box Office ("HBO") Comments at 3-4.

6/ HBO Comments at 3-4.

7/ See Third Annual Report at ¶ 4; House Video Competition Hearing, written testimony of Decker Anstrom, President and CEO of the National Cable Television Association at 1.

8/ The Bureau of Labor Statistics recently released data that showed for the 12 months ending June 30, 1997, cable rates were up 8.1% v. 2.3% growth in the Consumer Price Index. Bureau of
(continued...)

More importantly, competitive MVPDs attempting to enter the MVPD market are encountering anticompetitive practices, particularly where the coverage of Section 628 is not absolutely clear. Their collective experiences reflect the need for the continuation, and, indeed, the reinvigoration of the protections provided by Section 628.

A. Aspiring MVPDs Continue To Be Harmed By Impediments To Access To Programming.

Aspiring competitors to incumbent cable MVPDs agree in lockstep that their inability or tremendous difficulty in gaining access to quality programming remains a major impediment to their offering head-to-head robust competition to incumbent cable operators, despite enactment of the program access provisions.[9/] HBO attempts to use a sampling of competing MVPD programming line-ups to illustrate the fact that since competitive MVPDs enjoy access to HBO's programming, which is subject to the program access rules because of its vertical integration, the

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8/(...continued)
Labor Statistics, Consumer Price Index Summary: June 1997 (last modified July 15, 1997).
<http://stats.bls.gov/news.release/chi.nws.htm>

9/ See Comments of Ameritech New Media in the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, in CS Docket No. 97-141 at 14 (filed July 23, 1997) ("Fourth Annual Assessment"); Comments of the Wireless Cable Association International, Inc., Fourth Annual Assessment at 20; Comments of BellSouth Corporation, Fourth Annual Assessment at 10; Comments of DIRECTV, Inc., Fourth Annual Assessment at 5; House Video Competition Hearing, written testimony of Mr. Shant Hovnanian, Chairman and CEO of CellularVision USA, at 3; House Video Competition Hearing, written testimony of Mr. Richard S. Hahn, Vice President for Technology, Research and Development, Boston Edison, at 7.

program access rules are no longer necessary.[10] Such a syllogism proves nothing.

The Commission has found instances, as recently as last month, where there has been a denial of access of popular programming to competing MVPDs.[11] Moreover, there are five additional program access complaints pending at the Commission.[12] Finally, there have been sixteen program access complaints that have been settled prior to Commission decision, presumably resulting in grant of access to programming in some cases. Thus, the record before the Commission in Section 628 proceedings evidences that the program access rules are being invoked by competing MVPDs and are needed. It certainly does not prove that they have outlived their utility.

The more relevant question is what would happen to the state of nascent competition in the MVPD market without the program access rules. Ameritech submits that without the program access rules, such competition as now exists would wither. Compelling

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10/ HBO Comments at 3-4.

11/ Bell Atlantic Video v. Rainbow Programming Holdings, Inc. and Cable Systems Corporation, CSR 4983-P (Memorandum Opinion and Order) (rel. July 11, 1997); See also, Cellular Vision of New York, L.P. v. Sportschannel Associates, 10 FCC Rcd 9273 (1995), affirmed in Cellular Vision of New York, L.P. v. Sportschannel Associates, 11 FCC Rcd 3001 (1996).

12/ See, e.g., Ameritech/ Americast v. Rainbow Programming Holdings, Inc., CSR 4873-P filed December 6, 1996; Wizard Programming, Inc., CSR 5039-P filed July 8, 1997; the three separately filed program access complaints of Turner Vision, Inc., CSR 4676-P, Satellite Receivers, Ltd., CSR 4677-P, and Consumer Satellite System, Inc., CSR 4678-P have been consolidated.

evidence supporting this view is found by comparing Ameritech's ability to attract subscribers in markets where it offers HBO, pursuant to the program access rules, and those where it does not. Ameritech has been precluded from offering HBO due to a grandfathered exclusive arrangement in a number of communities.[13/] In those communities, Ameritech's market penetration levels are lower than where it carries HBO. Accordingly, if HBO could freely enter into exclusive contracts with affiliated cable operators as a rule rather than an exception, this would be a potent anticompetitive weapon to wield against aspiring MVPDs. Indeed, this example suggests that the primary reason the MVPD market is open to aspiring competitors is the existence of the program access provisions. If these rules were to be limited, repealed or even allowed to expire before a fully competitive MVPD market emerged, there would be no protection against the rampant anticompetitive behavior of recalcitrant vertically integrated cable operators and programmers that permeated the MVPD market prior to enactment of the 1992 Cable Act.

Further, for genuine competition to emerge, the program access rules should be expanded to reflect changing market realities pertaining to emerging impediments to access to programming. Today, potential competitors to incumbent cable

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13/ See Corporate Media Partners d/b/a/ Americast and Ameritech New Media, Inc v. Continental Cablevision and Home Box Office, CSR 4690-P (rel. Mar. 13, 1997) (Commission recognized grandfathered exclusive agreement).

operators face anticompetitive obstacles not covered by the current program access provisions. Exclusive contracts between non-vertically integrated cable programmers and cable operators are more pervasive. In addition, vertically integrated cable programmers reportedly are seeking new means to deliver programming in an effort to circumvent the program access provisions.[14/] These maneuverings around the program access rules unquestionably impair the ability of potential MVPDs to compete. Contrary to HBO's contention that the program access rules should be scrapped, the elixir to the current anticompetitive ills in the MVPD market is to expand their coverage to reach all anticompetitive behavior, regardless of delivery means, and regardless of the presence of vertical integration.

B. Aspiring MVPDs Still Suffer From Price Discrimination.

HBO argues that the program access rules are unnecessary because there has been no evidence of price discrimination.[15/] Again, HBO misses the point. Its hastily drawn conclusion fails to consider the reality of the fastpaced MVPD market which leaves aspiring MVPDs with a Hobson's choice. Many potential competitors are forced to accept programming on discriminatory

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14/ See Geraldine Fabrikant, As Wall Street Grows, A Cable Dynasty Grows, N.Y. Times, April 27, 1997, at Financial p. 1, reporting that Cablevision is contemplating delivering programming in New York by using fiber-optic wiring as opposed to traditional satellite which is subject to the program access rules.

15/ HBO Comments at 6.

prices, terms and conditions that violate the program access rules as the price for obtaining programming at all, much less within anything approaching a reasonable time frame from a competitive business perspective. In that regard, the protracted program access complaint procedure fails to provide for: (1) a deadline for Section 628 decisions; (2) a right to discovery; and (3) the award of damages or levying of fines for Section 628 violations. These shortcomings embody significant economic disincentives to bringing discriminatory pricing claims under Section 628. Ameritech has petitioned the Commission to make three targeted procedural changes to the program access rules to create a more procompetitive dynamic.[16/] In light of the defects in the Commission's current rules, it is simply illogical to conclude, as HBO does, that the absence of price discrimination complaints implies the absence of a problem. Instead, it means that the current remedies need to be strengthened to make the filing of price discrimination complaints efficacious.

II. HBO'S COST BENEFIT ANALYSIS OF THE PROGRAM ACCESS RULES IS FUNDAMENTALLY FLAWED.

HBO attempts to convince the Commission that the costs of the program access rules outweigh their benefits.[17/] By analyzing several discrete factors, HBO ignores the big picture.

16/ See Ameritech New Media Inc.'s Petition for Rulemaking to Amend 47 C.F.R. § 76.1003 -- Procedures for Adjudicating Program Access Complaints in RM No. 9097 (filed May 16, 1997).

17/ HBO Comments at 10.

The Congress determined in the 1992 Cable Act and again in the Telecommunications Act of 1996 that the costs of a noncompetitive MVPD market were unacceptable for the nation's consumers. Section 628 was one of the primary means for opening the MVPD market to competition and remains indispensable to accomplishing that objective. The costs imposed on the incumbent cable industry by this provision are dwarfed by the benefits to society yielded by the advent of competition.

Moreover, HBO's specific concerns do not withstand critical scrutiny. For example, contrary to HBO's assertion, the rules have not operated as a disincentive for vertically integrated programmers to develop innovative services. In fact, Congressman Shaeffer recently offered precisely the opposite assessment in a hearing: "[n]ow over the past several years, incumbent cable operators have spent tens of millions of dollars creating local programming...".[18/] Indeed, since 1992, more than 34 new cable programming networks, including HBO3, Animal Planet, Starz, CNN International, Turner Classic Movies, Outdoor Life and Speedvision in which cable operators have an attributable interest, have been launched.[19/]

Again, contrary to the allegations of HBO, the rules do not create uncertainty which skews negotiations and business decisions. The rules are quite clear and widely understood.

18/ House Video Competition Hearing (statement of Representative Shaeffer (R-CO)).

19/ See Third Annual Report, Appendix G.

Vertically integrated cable programming vendors may seek to push the program access envelope as far as possible in their negotiations with competitive MVPDs, but they cannot be heard to complain that the rules inject negotiating uncertainty. It is their conduct which necessitated imposition of the rules in the first place that is creating uncertainty. The Commission should not be sympathetic to such a plea, but must remember the unacceptable costs of not having the program access rules.

III. CONCLUSION

In a truly competitive MVPD market, HBO might be correct in maintaining that programming vendors have every economic incentive to distribute their programming to non-incumbent cable MVPDs.[20] However, the reality of today's MVPD market aptly illustrates that it is anything but competitive. Rather, incumbent cable operators are acting just as Vice President Gore feared that they would when he was a Senator:

> [I]t is the cable MSOs that are holding a marketplace sword of Damocles over the broadcasters, cable's technological competitors, and even over its own programming service by invoking exclusivity distribution mandates.[21]

With cable operators still demanding exclusivity in exchange for carriage,[22] there is an urgent need for the Commission and

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20/ HBO Comments at 7.

21/ 138 Cong. Rec. S427 (daily ed. July 27, 1992) (statement of Senator Gore in opposition to incumbent cable anticompetitive behavior).

22/ See Motion of Outdoor Life and Speedvision Networks for Petition for Public Interest Determination, CSR 5044-P at 21, (filed July 25, 1997).

Congress to strengthen Section 628, not weaken it. The program access rules are the linchpin of competition. If they were to disappear, competition would disappear with them. Rather than accept HBO's assessment, the Commission should reinforce the program access rules to provide more protection to aspiring competitors and prevent anticompetitive abuses.

Respectfully submitted,

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